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262-028—67

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1150

DAVID M. GOODMAN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1151

JOSEPH COHEN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1152

JOHN V. COUGHLIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims is reported at 369 F. 2d 976.

JURISDICTION

The judgments of the Court of Claims were entered on December 16, 1966. The petitions for writs of certiorari were filed on March 15, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

REGULATIONS INVOLVED

Part 22 of the regulations of the Civil Service Commission, 5 C.F.R. 22 (1960 Cum. Pocket Supp.), provides in pertinent part:

> § 22.401 *Investigation.*
>
> (a) *Scope.* Investigation will be made by the Commission to develop the facts and circumstances relative to the adverse decision.
>
> (b) *Evidence.* Statements of witnesses shall be by affidavit, when practicable * * *.
>
> * * * * *.
>
> § 22.604 *Rules of evidence.*
>
> Rules of evidence will not be strictly applied during hearings, but the Commission representative in charge of the hearing shall use reasonable discretion to exclude irrelevant or unduly repetitious testimony.
>
> * * * * *.
>
> § 22.607 *Appearance of witnesses.*
>
> The Commission is not authorized to subpoena witnesses. The employee and his designated representative, and the employing agency, must make their own arrangements for the appearance of witnesses.

QUESTIONS PRESENTED

1. Whether petitioners, in their appeals to the Civil Service Commission from the action of the Bureau of

Customs in discharging them, were prejudiced by the submission to the Commission of certain documents from which material had been deleted.

2. Whether the failure of petitioners Goodman and Cohen to make private arrangements for the appearance of requested witnesses at the Commission's hearings was excusable neglect.

3. Whether a Civil Service Commission regulation which requires the statements of witnesses in employee-removal hearings held by the Commission to be in affidavit form when practicable was violated by the submission to the Commission of an unattested letter from the Acting Commissioner of Customs stating the Bureau's position and of certified extracts from a criminal proceeding.

STATEMENT

Petitioners are former employees of the Bureau of Customs who, claiming that their discharges were improper, brought these suits in the Court of Claims for back pay. Their discharges arose from a conspiracy, involving an importer of haberdashery and certain customs inspectors at the Port of New York, to evade customs duties (Pet. App. A–2).[1] The importer, Domenico Guarna, had smuggled thousands of dollars worth of men's furnishings into this country in his baggage and that of associates (Pet. App. A–2—A–3, A–9—A–10). Although reasonable inspection of the baggage involved would have revealed the contraband (Pet. App. A–31, A–49—A–50), Guarna and his asso-

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari filed in No. 1150.

ciates passed customs several times before the smuggling operation was uncovered by customs agents (Pet. App. A–2).

After the conspiracy was discovered, the Bureau of Customs placed formal charges of improper baggage inspection against petitioners (David M. Goodman, Joseph Cohen and John V. Coughlin), who had failed to discover the contraband when they inspected the baggage of Guarna and his associates (Pet. App. A–4, A–7, A–10). Cohen was also charged with making a false statement under oath in denying acquaintance with Guarna (Pet. App. A–4). Following their written replies to the charges and their personal appearances before the Commissioner of Customs or the Acting Commissioner of Customs to answer the charges orally, petitioners were removed from the customs service (Pet. App. A–5, A–8, A–11).

Petitioners appealed their removal to the Civil Service Commission (Pet. App. A–5, A–8, A–11). Full evidentiary hearings were held. In each case, the Bureau transmitted certain documents to the Commission, along with an unattested letter from the Acting Commissioner of Customs outlining the Bureau's position on the removal (Pet. App. A–28, A–35, A–45). Included among the documents submitted by the Bureau in Goodman's case were extracts from teletype reports made by Customs Agent David Cardoza during his investigation of the smuggling operation, extracts from statements given by Guarna on October 1, 1957, and November 22, 1957, and extracts from testimony given in the criminal prosecution of certain customs inspectors (including petitioner Cohen) who

were charged with complicity in the smuggling operation (Pet. App. A–45—A–46). Included among the documents submitted in Cohen's removal case were extracts from teletype reports made by Cardoza, an extract from Guarna's statement of November 22, 1957, and extracts from testimony given at the criminal trial along with the court's remarks in sustaining the motion to acquit Cohen (Pet. App. A–28). Documents submitted in Coughlin's case included his own statement of October 1, 1957, admitting that he had examined only four out of seventeen pieces of Guarna's baggage on a day when the Bureau's "one hundred percent" inspection system was in effect,[2] an extract from Guarna's statement of October 1, 1957, and extracts from Cardoza's teletype reports and from testimony given at the criminal trial (Pet. App. A–34, A–36—A–37).

Petitioners Goodman and Cohen submitted affidavits to the Civil Service Commission in which they objected to the Bureau's submissions and requested the presence of certain witnesses at their hearings, some of whom were employees of the Bureau (Pet. App. A–30, A–47). No attempts were made by Goodman and Cohen themselves to arrange for the appearance of the persons requested (Pet. App. A–13), and, with one exception (Customs Agent David F. Cardoza), none of them appeared.

The Civil Service Commission upheld the action of the Bureau of Customs on the merits and found no

[2] Pursuant to this system, baggage inspectors are required to open *all* baggage and make reasonable examination to satisfy themselves that entrants are not attempting to evade the payment of customs duties (Pet. App. A–7).

infringement of petitioners' procedural rights (Pet. App. A–30—A–31; A–37—A–39; A–49—A–50). Petitioners then instituted the present actions in the Court of Claims for back pay. The Court of Claims denied recovery and dismissed the petitions (Pet. App. A–50).

ARGUMENT

The Civil Service Commission, after a hearing, upheld petitioners' removal from government service. The question presented is whether that hearing was procedurally adequate. The Court of Claims, after meticulous examination of the issues in a *de novo* proceeding, concluded that petitioners had been accorded due process of law. We submit that this conclusion was sound in the circumstances of this case and that further review is unwarranted.

1. Petitioners argue that they were prejudiced by deletions from Guarna's statements and from Cardoza's teletype reports. However, although they had access to the complete documents in the Court of Claims, they point to no particular wherein they were prejudiced.[3] The Court of Claims carefully compared the extracted with the complete documents and found that there had been no omissions prejudicial to petitioners (Pet. App. A–30, A–37, A–48), and this finding, we submit, is correct.

[3] Petitioner Coughlin, we submit, is not entitled to make any complaint, general or specific, since he did not object to the submission of any document to the Civil Service Commission (Pet. App. A–36). Moreover, he admitted the charge against him (Pet. App. A–34, A–35, A–36).

In Cohen's case, the following deletions[4] from the teletype reports had been made: (1) a statement that Cohen may have received a bribe from Guarna; (2) statements, attributed to Cohen, to the effect that he knew of the improper baggage declarations; (3) the United States Attorney's opinion that Cohen's indictment could be supported on the basis of the testimony of Guarna and other witnesses; and (4) summations of the evidence compiled against other customs inspectors (Pet. App. A–29). From the single statement of Guarna submitted by the Bureau and utilized by the Commission in its hearing, that of November 22, 1957, the court found the following deletions: (1) Guarna's claim that he paid Cohen $100 while Cohen was in Guarna's office and while Cohen was in uniform; and (2) Guarna's claim that a similar money payment was made to Goodman (Pet. App. A–30).

In Goodman's case, the court found, the deletions from the teletype reports were of the same nature as in Cohen's case (Pet. App. A–48) and the deletions from Guarna's November 22, 1957, statement were also similar (Pet. App. A–48). Finally, deletions from

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[4] In addition to making certain deletions from documents submitted to the Commission, the Bureau of Customs did not submit to the Commission, in Cohen's case, any part of Guarna's statement of October 1. It stated to the Commission its reason for doing so: that "Mr. Guarna made no mention of Mr. Cohen" in that statement (Pet. App. A–28). While it is conceivable that Guarna's initial omission to mention Cohen (whom he implicated in a later statement) might have had some value in impeaching his later statement, at no time has petitioner Cohen sought or indicated he would use the October 1 statement for that purpose. The statement was a part of the record before the Court of Claims (see Pet. App. A–30, A–36—A–37).

Guarna's October 1, 1957, statement covered matter either unrelated to Goodman or tending to show that Goodman was to receive bribe money (Pet. App. A–48).[5]

As is apparent, the purpose of the deletions of which petitioners complain was to eliminate (1) irrelevant matter and (2) incriminating matter on which the Bureau of Customs had not relied in discharging petitioners. Such deletions, we stress, are necessitated by the character of a Civil Service Commission appeal. It is normally—and was here—based on documentary rather than live evidence.[6] Petitioners—who, had they wished, could have procured the appearance of witnesses (see *infra*, pp. 8–9)—were not prejudiced by this method of proceeding.

2. Petitioners Goodman and Cohen, by affidavits filed with the Civil Service Commission, requested the

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[5] The court found that the material deleted from documents submitted in Coughlin's case was similar to that deleted from documents submitted in the Goodman and Cohen cases. See Pet. App. A–37. However, we deem it is unnecessary to describe these deletions in detail because of Coughlin's failure to object to the submission of the documents in his case, and his admission of the charges. See *supra*, p. 6, n. 3.

[6] Petitioners' reliance (Pet. 6) on *Jencks* v. *United States*, 353 U.S. 657, and on certain civil cases which apply the principle of *Jencks* to administrative proceedings, is thus misplaced. In *Jencks* and the other cases the government was only required to produce statements of individuals who actually appeared and testified at trial. This limitation on the scope of the *Jencks* principle is well recognized. *In re Kosuga*, 7 Pike & Fischer Ad. L. 2d 379. See, also, *United States* v. *Moia*, 251 F. 2d 255, 257 (C.A. 2); *National Labor Relations Board* v. *Kiekhaefer Corp.*, 292 F. 2d 130, 135 (C.A. 7). None of the materials deleted here were pretrial statements of witnesses in the Civil Service Commission proceeding.

appearance of certain witnesses. But petitioners made no attempt to approach the requested witnesses personally and arrange with them for their appearance at the Commission's hearings (Pet. App. A–13). When the requests were transmitted to the Bureau of Customs, the Bureau properly took the position that it was petitioners' responsibility initially to attempt to make the necessary arrangements. 5 C.F.R. 22.607; *Williams* v. *Zuckert*, 371 U.S. 531, on rehearing, 372 U.S. 765; *McTiernan* v. *Gronouski*, 337 F. 2d 31, 37 (C.A. 2); *Brown* v. *Zuckert*, 349 F. 2d 461, 463–464 (C.A. 7), certiorari denied, 382 U.S. 998.

The Court of Claims rejected as unfounded the charge that the Bureau of Customs hindered petitioners in procuring the appearance of employees of the Bureau as witnesses. A customs agent who was involved in the investigation of the smuggling operation, and whose presence at the Commission hearing was requested by petitioner Cohen, testified in the Court of Claims that, had any of the petitioners asked him to appear, he would have done so (Ct. Cl. Tr. 261), and the Court of Claims specifically found that, had personal requests been made, the witnesses sought would have been available. (Pet. App. A–14). Thus, petitioners bear the responsibility for the failure of the requested witnesses to appear at the hearing.

3. Petitioners' final contention is that the Commission violated its own Regulation 22.401 (*supra*, p. 2), which requires statements of witnesses to be by affidavit when practicable. However, as the Court of Claims pointed out (Pet. App. A–17), the extracts of testimony were certified copies of portions of the

transcript of *sworn* testimony given at a criminal trial. This was fully the equivalent of an affidavit. Nor was the regulation—designed to assure the reliability of the evidence on which the Commission relies—intended to require that a judge's remarks made in open court (see Pet. App. A–27—A–28) must be presented in the administrative hearing by way of affidavit.

The Acting Commissioner's letter, as the Court of Claims found (Pet. App. A–17), was not a statement of a witness, but merely a position paper of the Bureau of Customers. Hence, it was not within the scope of the regulation. Nor were the extracts of Cardoza's teletype reports to his superiors in Washington; they were not statements of witnesses.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted.

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